

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Rural Health Care Support Mechanism) WC Docket No. 02-60
Promoting Telehealth in Rural America) WC Docket No. 17-310

ORDER

Adopted: May 25, 2022

Released: May 25, 2022

By the Chief, Wireline Competition Bureau:

1. By this Order, the Wireline Competition Bureau (Bureau) extends the waiver of sections 54.604(a) and 54.605(a) of the Commission’s rules, which set forth the requirements that health care providers and service providers participating in the Telecommunications (Telecom) Program of the Rural Health Care (RHC) Program use the database of rates (Rates Database) to calculate urban and rural rates, for all health care and telecommunication service providers nationwide seeking support in funding year 2023. We issue this limited waiver as an extension of the Nationwide Rates Database Waiver Order issued on April 8, 2021. We issue this extension to ensure that telecommunications service providers nationwide will receive sufficient Telecom Program support for funding year 2023 while the Commission develops a reliable, predictable and effective rate determination mechanism for the Telecom Program.

I. BACKGROUND

2. The Commission’s RHC Program consists of two component mechanisms: (1) the Telecom Program; and (2) the Healthcare Connect Fund (HCF) Program. The Telecom Program subsidizes the difference between the rates in the health care provider’s rural area and rates for comparable services available in urban areas within the health care provider’s state. The HCF Program promotes the use of broadband services and facilitates the formation of health care provider consortia that include both rural and urban health care providers by providing a flat 65% discount on an array of advanced telecommunications and information services.

3. In the Promoting Telehealth Report and Order, the Commission directed the Universal Service Administrative Company (USAC) to create a database of urban and rural rates within each state that would be used to calculate median rural and urban rates for functionally similar services in the state within a health care provider’s applicable rurality tier. After the Rates Database was made available to

1 47 CFR §§ 54.604(a), 54.605(a) (2019).

2 See Promoting Telehealth in Rural America, WC Docket No. 17-310, Order, DA 21-394, 35 FCC Rcd 7051, 7051, para. 1 (WCB 2021) (Nationwide Rates Database Waiver Order).

3 See 47 U.S.C. § 254(h)(1)(A); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9093-161, paras. 608-749 (1997) (Universal Service First Report and Order).

4 See 47 U.S.C. § 254(h)(2)(A); 47 CFR §§ 54.611, 54.612; Rural Health Care Support Mechanism, WC Docket No. 02-60, Report and Order, 27 FCC Rcd 16678, 16680-81, paras. 1-3 (2012) (Healthcare Connect Fund Order).

5 Promoting Telehealth in Rural America, Report and Order, 34 FCC Rcd 7335, 7372-73, para. 78 (2019) (Promoting Telehealth Report and Order); 47 CFR §§ 54.604(b) (2019) (determining the urban rate); 54.605(b)

(continued....)

the public on July 1, 2020,⁶ anomalies became apparent in the calculation of rural rates.⁷ A primary assumption underlying the creation of the Rates Database and associated rurality tiers was that, in general, the cost to provide services increases as the level of rurality increases and overall rates tend to increase (while rates per megabit per second tend to decrease) as bandwidth increases.⁸ After conducting an examination of the initial median rural rate calculations in the Rates Database, the Bureau found anomalies that could result in inadequate or inconsistent Telecom Program support, such as lower median rural rates in more rural areas of the state or lower median rural rates for higher bandwidth services.⁹

4. Due to significant anomalies in the initial rural rate calculations in the State of Alaska, in the *Alaska Rates Database Waiver Order* the Bureau waived the requirement to use the Rates Database for determining rural rates for health care providers in the State of Alaska for funding year 2021 and for funding year 2022.¹⁰ After discovering significant anomalies in the calculation of both urban and rural rates in states outside of Alaska, the Bureau expanded the waiver granted in the *Alaska Rates Database Waiver Order* to apply to rural and urban rates nationwide, delaying implementation of the Rates Database for all health care providers that apply for Telecom Program support.¹¹ Under these waivers,

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(determining the rural rate). Under the Commission's rules, the rurality tiers are defined as Less Rural, Rural, Extremely Rural, and Frontier. Less Rural areas are those in a Core Based Statistical area that contains an urban area with a population of 25,000 or greater but are within a specific census tract that itself does not contain any part of a Place or Urban Area with a population of greater than 25,000. Rural areas are those that are within a Core Based Statistical Area that does not have an Urban Area with a population of 25,000 or greater. Extremely Rural areas are those that are entirely outside of a Core Based Statistical Area. Frontier areas are located in Alaska only, in areas outside of a Core Based Statistical Area that are inaccessible by road as determined by the Alaska Department of Commerce, Community, and Economic Development, Division of Community and Regional Affairs. 47 CFR § 54.605(a)(1) (2019).

⁶ See *Wireline Competition Bureau Provides Guidance on the Implementation Schedule for Reforms Adopted by the Rural Health Care Program Promoting Telehealth Report and Order*, WC Docket No. 17-310, Public Notice, 34 FCC Rcd 11983, 11985 (WCB 2019) (*Promoting Telehealth Implementation Public Notice*).

⁷ For example, in Alaska, for a 10 Mbps connection, the rural rate for a dedicated data transmission service in the Extremely Rural tier (\$3,125) was lower than the rural rate for the Less Rural tier (\$3,168) for that service even though it would likely cost the service provider more to serve locations in the less densely populated Rural tier; And in California, the Rates Database showed a rural rate for a 20 Mbps connection (\$1,351) for a dedicated data transmission service as higher than the rural rate for a 50 Mbps connection (\$1,308) for that service. See USAC, Rural Health Care Program Tools, Rates Database, <https://rhc.usac.org/ratesdb/#/ratesSearch> (last visited May 25, 2022); see also *SHLB Letter* at 4.

⁸ See *Further Notice* at 14423, para.10.

⁹ See USAC, Rural Health Care Program Tools, Rates Database, <https://rhc.usac.org/ratesdb/#/ratesSearch> (last visited May 25, 2022).

¹⁰ *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Order, DA 21-83, at 1, para. 2 (WCB Jan. 19, 2021) (*Alaska Rates Database Waiver Order*). In the *Alaska Rates Database Waiver Order*, the Bureau waived section 54.605(a) for funding year 2022 unless the Commission separately addressed pending petitions for reconsideration of the *Promoting Telehealth Report and Order* by January 19, 2022. *Alaska Rates Database Waiver Order* at 1, para. 2. To provide certainty to applicants and service providers on the rates available for funding year 2022 when competitive bidding for funding year 2022 began on July 1, 2021, the Bureau extended the waiver granted in the *Alaska Rates Database Waiver Order* through funding year 2022 regardless of when the pending petitions for reconsideration are resolved. *Nationwide Rates Database Waiver Order* at 6, para. 12, n.39.

¹¹ See *Nationwide Rates Database Waiver Order* at 1, para. 1. *Id.* at 9, para. 20. See also Letter from Gina Spade, Counsel for Schools, Health and Libraries Broadband Coalition to Marlene H. Dortch, Secretary, FCC, at 3-9, WC Docket No. 17-310 (dated Mar. 27, 2021) (showing that the urban rate for a 10 Mbps dedicated service exceeds the urban rate for a 100 Mbps dedicated service in Connecticut, that the urban rate for a 20 Mbps dedicated service exceeds the urban rate for a 100 Mbps dedicated service in Alabama, and that the urban rate for a 10 Mbps dedicated service exceeds the urban rate for a 100 Mbps dedicated service in Illinois).

health care providers could use urban and rural rates approved in the previous three funding years or, if no such rates were available, could determine urban and rural rates using one of the three available methods in the Commission's previous rules for funding year 2021 and funding year 2022.¹² On April 12, 2022, the Bureau extended the Alaska-specific waiver order to funding year 2023.¹³

5. To identify a reliable, predictable and effective method for determining support in the Telecom Program, on February 18, 2022, the Commission adopted a Further Notice of Proposed Rulemaking (*Further Notice*) which, among many other reforms to promote efficiency and increased participation in the RHC Program, seeks comment on various methods for determining support in the Telecom Program including alternative rate determination mechanisms to the Rates Database.¹⁴ Comments in response to the *Further Notice* were due April 14 and reply comments are due May 16.¹⁵

6. In the *Further Notice*, the Commission sought comment on how to manage the transition from the current rate determination rules to the new rules resulting from the rulemaking, including whether to extend the nationwide waiver of the Rates Database for funding year 2023.¹⁶ Several commenters urged the Commission to extend the nationwide waiver of the Rates Database to funding year 2023,¹⁷ and the Schools, Health and Libraries Broadband Coalition filed a letter seeking such an extension.¹⁸ In this Order, we extend the waiver to include health care and telecommunication service providers nationwide.

II. DISCUSSION

7. Generally, the Commission's rules may be waived or suspended for good cause shown.¹⁹ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.²⁰ In addition, the Commission may take into account

¹² See 47 CFR § 54.607 (2019). Health care providers and their service providers were continue to use Method 1, Method 2, or Method 3 to calculate rural rates, using the same processes for submission and review of rates that applied for funding year 2020. See *Nationwide Rates Database Waiver Order* at 7057-58, 7059-60, paras. 16-17, 23.

¹³ See *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Order, DA 22-401, at 1, para. 1 (WCB Apr. 12, 2022) (*Alaska Rates Database Waiver Extension Order*). See also *Alaska Rates Database Waiver Order* at 1, para. 2.

¹⁴ See *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Further Notice of Proposed Rulemaking, FCC 22-15 (Feb. 18, 2022) (*Further Notice*), <https://www.federalregister.gov/documents/2022/03/15/2022-05191/promoting-telehealth-in-rural-america>.

¹⁵ Federal Communications Commission, *Promoting Telehealth in Rural America*, Proposed Rule, 87 Fed. Reg. 14421 (Mar. 15, 2022).

¹⁶ *Further Notice* at 23, para. 63.

¹⁷ See, e.g., ENA Health Services, LLC Comments at 6, n.8 (“...the Commission should postpone the use of the Rates Database for FY 2023 because there is simply not enough time for a new system to be adopted by the Commission and implemented by USAC in that time frame. Another year of transition would enable HCPs to determine their best course of action without losing funding in the short term.”); Schools, Health and Libraries Broadband Coalition Comments at 5 (“Given the extremely short time period before the beginning of Funding Year 2023 and the well-recognized problems with the Rates Database, the further waiver granted to Alaska should be extended to apply on a nationwide basis as soon as possible.”); Windstream Services, LLC Comments at 6 (“But it is becoming increasingly clear that such resolution may not be possible, particularly in the limited time available before the existing waiver of the use of the rates database expires at the end of the current funding year.”).

¹⁸ Letter from John Windhausen, Jr., Executive Director at Schools, Health and Libraries Broadband Coalition, to Trent B. Harkrader, Chief, Wireline Competition Bureau, FCC, WC Docket No. 17-310, at 3 (filed Apr. 22, 2022).

¹⁹ 47 CFR § 1.3.

²⁰ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²¹ Waiver of the Commission's rules is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation will serve the public interest.²² We find that such special circumstances exist and that it would serve the public interest to waive the requirements that health care and service providers use the Rates Database to calculate urban and rural rates in the Telecom Program through funding year 2023. In funding year 2023, health care providers and service providers will continue to use the processes for determining rural and urban rates that they used for funding years 2021 and 2022.

8. *Rural and Urban Rates Waivers.* We extend the waiver of sections 54.605(a)²³ and 54.604(a)²⁴ granted in the *Nationwide Rates Database Waiver Order* for all health care providers that apply for Telecom Program support in funding year 2023.²⁵ Regarding rural rates, the examination of initial median rural rate calculations in the Rates Database revealed anomalies in states besides Alaska that could result in inadequate or inconsistent Telecom Program support. Regarding urban rates, we find that the circumstances where the urban rate at a bandwidth in a state exceeds the urban rate at a lower bandwidth, or when the urban rate exceeds all rural rates for the same services in the same state, justify a waiver of the urban rates database as the Bureau continues to analyze and improve our rate determination mechanism. As the Commission continues to analyze the Telecom Program's rate determination process, the public interest will also be served by waiving the requirement to use the Rates Database for determining rural rates for funding year 2023. This action ensures that rural telecommunications service providers will receive levels of support on par with support in previous funding years, preserving the status quo while the Commission examines input on how to reform the rate determination mechanism.²⁶

9. *Establishing Rural Rates.* The processes allowing the use of previously-approved rates for determining rural rates for funding years 2021 and 2022 established in the *Nationwide Rates Database Waiver Order* will apply for funding year 2023.²⁷ Health care providers and their service providers may continue to use Method 1, Method 2, or Method 3 to calculate rural rates, using the same processes for submission and review of rates that applied for funding year 2020.²⁸ As a reminder, these methods for calculating the rural rate are sequential. Method 1 must be used unless the carrier is not actually charging non-health care provider customers rates for the same or similar services in the rural area where the health care provider is located.²⁹ Method 2 generally must be used if Method 1 cannot be used.³⁰ Finally, where there are no tariffed or other publicly available rates charged by other carriers for same or similar services in the rural area where the health care provider is located, or if the carrier reasonably determines that the

²¹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

²² *Northeast Cellular*, 897 F.2d at 1166.

²³ 47 CFR § 54.605(a) (2019).

²⁴ 47 CFR § 54.605(a).

²⁵ See *Nationwide Rates Database Waiver Order* at 7056-57, paras. 13-15.

²⁶ See *Further Notice* at 17-23, paras. 44-63.

²⁷ See *Nationwide Rates Database Waiver Order* at 7057-58, paras. 16-17.

²⁸ See 47 CFR § 54.607 (2019).

²⁹ See 47 CFR § 54.607(a) (2019).

³⁰ See 47 CFR § 54.607(b) (2019) (“If the telecommunications carrier serving the health care provider is not providing identical or similar services in the rural area, then the rural rate shall be the average of tariffed and other publicly available rates, not including any rates reduced by universal service programs, charged for the same or similar services in that rural area over the same distance as the eligible service by other carriers.”).

rural rate calculated under Method 2 is unfair, then the carrier may seek approval of a cost-based rural rate under Method 3.³¹

10. We also continue to find that it is in the public interest to allow the use of a rural rate that has been approved for the same service at the same facility within the past five funding years.³² As mentioned in our previous waivers, permitting the use of previously-approved rural rates will both reduce administrative burdens and avoid repeating problems with cost-based rate submissions that have been resolved in the course of previous years' rate approval processes.³³ The rural rate must be the most recently approved rate for that facility/service combination.³⁴ If there is no approved rate for a particular facility/service combination, the health care provider and its carrier may use rural rates approved for the same or similar services to the facility with the same or similar geographic characteristics.³⁵ The health care provider or service provider should submit these rural rates to USAC with documentation showing that the rural rates were previously-approved.³⁶ If no such comparable rates are available, the rural rate must be established using one of the preexisting methods.³⁷ We emphasize that for funding year 2022 and funding year 2023, the most recently-approved rate for a facility/service combination is the most recently approved rate on the date the health care provider submits its FCC Form 465. In the event that a service provider receives approval of new rural rates in the time between submission of the FCC Form 465 and submission of the funding request on FCC Form 466, the most recently-approved rural rate at the time of the FCC Form 465 submission would be applicable.³⁸

11. *Establishing Urban Rates.* The processes allowing the use of previously-approved rates for determining urban rates for funding years 2021 and 2022 established in the *Nationwide Rates Database Waiver Order* will apply for funding year 2023. As with rural rates, it is in the public interest to allow health care providers nationwide to use an urban rate that has been approved for the same service at the same facility within the past five funding years.³⁹ If more than one such rate has been approved, the urban rate must be the most recently approved rate for that facility/service combination.⁴⁰ If there is no approved urban rate for a particular facility/service combination, the health care provider may use an urban rate approved for the same or similar services to a facility with the same or similar geographic characteristics.⁴¹ The health care provider or service provider should submit these urban rates to USAC with documentation showing that the urban rates were previously approved. If no such comparable rates are available, the urban rate must be established using the preexisting rule.⁴² Finally, in the rare event in

³¹ See 47 CFR § 54.607(b) (2019) (“If there are no tariffed or publicly available rates for such services in that rural area, or if the carrier reasonably determines that this method for calculating the rural rate is unfair, then the carrier shall submit for the state commission’s approval, for intrastate rates, or the Commission’s approval, for interstate rates, a cost-based rate for the provision of the service in the most economically efficient, reasonably available manner.”).

³² The five funding years represents funding years 2018, 2019, 2020, 2021, and 2022. See *Alaska Rates Database Waiver Extension Order* at 4, para. 11; *Nationwide Rates Database Waiver Order* at 7057-58, paras. 16-17.

³³ *Nationwide Rates Database Waiver Order* at 7057-58, paras. 16-17.

³⁴ See *id.* at 7057, para. 17.

³⁵ See *id.* at 7058, para. 17.

³⁶ See *id.*

³⁷ See 47 CFR § 54.607 (2019).

³⁸ See *Alaska Rates Database Waiver Extension Order* at 5, para. 11.

³⁹ See *Nationwide Rates Database Waiver Order* at 7059, para. 23.

⁴⁰ *Id.*

⁴¹ *Id.* at 7060, para. 23.

⁴² See 47 CFR § 54.605 (2019).

which there is no previously-approved urban rate for the particular facility/service combination or for the same or similar services to a facility with the same or similar geographic characteristics, we direct USAC to use the urban rate generated by the Rates Database instead of denying the health care provider's funding request.

12. We are committed to guarding against waste, fraud, and abuse in the Universal Service Fund (USF) programs, including the RHC Program. Although we grant the limited waivers described herein, program participants and service providers remain otherwise subject to audits and investigations to determine compliance with USF program rules and requirements. We will require USAC to recover funds through its normal process that we discover were not used properly. We emphasize that we retain the discretion to evaluate the uses of monies disbursed through the USF programs and to determine on a case-by-case basis that waste, fraud, or abuse of program funds occurred, and that recovery is warranted. Additionally, in the event we discover any improper activity resulting from our action today, we will subject the offending party to all available penalties at our disposal, and will direct USAC to recover funds, assess retroactive fees and/or interest, or both. We remain committed to ensuring the integrity of the RHC Program and will continue to aggressively pursue instances of waste, fraud, or abuse under our own procedures and in cooperation with law enforcement agencies.

III. ORDERING CLAUSES

13. ACCORDINGLY, IT IS ORDERED that pursuant to the authority in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and pursuant to sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 CFR §§ 0.91, 0.291, and 1.3, that sections 54.604(a) and 54.605(a), of the Commission's rules, 47 CFR §§ 54.604(a), 54.605(a), ARE WAIVED to the extent provided herein.

14. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 CFR § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Trent B. Harkrader
Chief
Wireline Competition Bureau